BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDGAR S. HOWELL, III	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 248,381;
LAFARGE CORPORATION	)	248,382; & 248,383
Respondent	)	
AND	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 30, 2001, Award of Administrative Law Judge Jon L. Frobish. The Appeals Board held oral argument on November 9, 2001, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record listed in the Award of the Administrative Law Judge. The Appeals Board adopts the stipulations contained in the Award of the Administrative Law Judge.

Additionally, the parties stipulated at oral argument before the Board that the issues appealed in Docket Nos. 248,381 and 248,382 were no longer before the Board. The parties have agreed that the 5 percent permanent partial disability to the left lower extremity in Docket No. 248,381 for claimant's left ankle injury of March 21, 1999, is appropriate. The parties further stipulated that the zero percent permanent partial disability to the right upper extremity for claimant's right elbow injury on June 7, 1999, in Docket No.

248,382 is also appropriate. The Appeals Board, therefore, affirms those findings contained in the Award of the Administrative Law Judge.

Additionally, the parties agreed that the date of accident dispute in Docket No. 248,383 is resolved and, thus, no longer before the Board. The parties stipulated that September 1, 1999, claimant's last day worked before he underwent carpal tunnel surgery, is the appropriate date of accident in Docket No. 248,383. Therefore, the Administrative Law Judge's finding that claimant's accidental injury occurred through June 1, 2000, when claimant was first returned to work at accommodated work, is modified.

Additionally, the parties agree, should the claim in Docket No. 248,383 be found compensable, Dr. Estivo's 12 percent functional impairment is appropriate, as it is the only functional impairment opinion in the record regarding claimant's bilateral carpal tunnel syndrome.

The Board further notes that the deposition of Steve Benjamin, taken April 10, 2001, was not received by the Administrative Law Judge until May 3, 2001. As the Administrative Law Judge's Award was issued April 30, 2001, it is apparent that the Administrative Law Judge did not have for his consideration the deposition of Mr. Benjamin. The parties have agreed that this deposition is a part of the record to be considered by the Board. Additionally, the parties have acknowledged that they do not desire this matter be remanded to the Administrative Law Judge for his consideration of that additional deposition, but, instead, request that the matter remain with the Board for its determination.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment in Docket No. 248,383, through a series of accidents culminating on September 1, 1999.

(2) Did claimant provide timely notice of accident in Docket No. 248,383, as required by K.S.A. 44-520 (Furse 1993)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds that the Award of the Administrative Law Judge should be modified as to the date of accident, but, otherwise, affirmed.

Claimant, an employee of respondent for 22 years, had worked at its southeast Kansas facility since February 1989. Prior to that time, claimant had worked at the cement plant in Dallas, Texas.

In 1999, claimant was working as a finishing helper, which involved hammering, shoveling, jackhammering and running impacts. Claimant testified that his job was constant and repetitive. Respondent provided evidence that claimant also spent time checking bins, using a grease gun and carrying buckets, performing clean-up responsibilities, walking, observing and checking the product flow, and monitoring the bins. The evidence presented indicated claimant would perform these upper extremity activities involving the repetitive use of the various hand and electrical tools from 25 to 100 percent of the day, depending upon the conditions.

Claimant testified he spent approximately 80 percent of the day using his hands, performing the various activities. Respondent's representative Horace Compton, the LaFarge plant manager, testified that claimant would regularly spend approximately 25 percent of his time poking materials through the bin. The remainder of the day, claimant would spend lubricating, cleaning up, walking, observing and checking. He testified claimant spent approximately 50 percent or more of the time walking around, monitoring the bins. However, Mr. Compton acknowledged that, if the weather conditions were inappropriate, i.e., if the weather was wet or damp, that claimant could be required to use a poker bar to get the materials through the conveyors more than 25 percent of an 8-hour day. It was acknowledged that, at times, claimant may be required to use his hands on a repetitive basis for two to four days at a time.

In 1999, claimant began experiencing problems in both arms. He experienced difficulties holding on to things and began dropping tools. Claimant was referred to Ambrosio P. Mendiola, M.D., respondent's company doctor, for treatment. While being treated by Dr. Mendiola, claimant requested that he be allowed to see an orthopedic surgeon for his bilateral upper extremity complaints. Claimant was allowed to choose the orthopedic surgeon by Dr. Mendiola, and he chose orthopedic surgeon Michael Estivo, D.O. Claimant first saw Dr. Estivo on August 25, 1999. Dr. Estivo advised him at the September 2, 1999, examination that his symptoms were related to his work activities. Dr. Estivo prepared a slip, taking claimant off work on September 2, 1999. The off work slip identifies claimant's conditions as bilateral carpal tunnel syndrome and left ankle strain/sprain.

Claimant returned to work on September 2, 1999, and, during a meeting with Mr. Compton and Roger D. Surber, respondent's production manager, presented them with the slip from Dr. Estivo. He advised them that he was having pain in his upper extremities and was being taken off work by Dr. Estivo. Mr. Compton testified that he was not aware

that claimant was alleging his carpal tunnel condition was related to his work. In fact, he testified that he did not remember carpal tunnel even being mentioned at the time of the meeting. Mr. Surber, however, recalls receiving the prescription slip from Dr. Estivo, specifying that claimant was suffering from carpal tunnel syndrome. Mr. Surber also denied being told that claimant was alleging the carpal tunnel condition was work related. However, Mr. Compton testified that, at the September 2 meeting, claimant did state that he was losing feeling in his hand and was dropping tools as a result of his hand problems. This was the first time claimant had made complaints to Mr. Compton about claimant's inability to grip tools.

Both Mr. Surber and Mr. Compton alleged that the first time they were made aware claimant was claiming bilateral carpal tunnel syndrome related to his work was upon receipt of a letter from claimant's attorney on September 23, 1999.

Mr. Surber also testified that, prior to September 2, 1999, claimant did not mention his inability to grasp tools, the numbness and tingling in his hands or his inability to perform work because of pain in his hands. Both Mr. Surber and Mr. Compton acknowledged, however, that the gist of the September 2, 1999, conversation was that claimant's medical condition was not to be considered a lost-time accident. Claimant acknowledged the conversation between the three on September 2, 1999, included discussion about lost-time accidents and the company's bonus and awards program should they avoid lost-time accidents for a particular period of time. Mr. Compton and Mr. Surber recommended that claimant take vacation time.

Dr. Mendiola, the company doctor, did not refer claimant to Dr. Estivo, but merely advised claimant to pick out a doctor of his choice, and claimant picked Dr. Estivo for treatment of his bilateral carpal tunnel condition.

After the meeting, claimant made application for short-term disability benefits and began receiving those shortly after the September 2, 1999, meeting. Those benefits were paid in the amount of $370.08 per week which, after deductions, paid $239.86 per week.

Respondent contends that claimant has failed to prove that his accidental injury arose out of and in the course of his employment. They argued that claimant's work activities were not repetitive enough to cause or even aggravate claimant's carpal tunnel syndrome. However, when Dr. Estivo was read a description of claimant's duties as a finishing helper, he testified that the repetitive activities performed by claimant with respondent either caused or contributed to claimant's bilateral carpal tunnel and bilateral upper extremity conditions. No other causative medical opinion is contained in the record regarding claimant's bilateral carpal tunnel condition syndrome.

In workers' compensation litigation, the burden of proof is upon claimant to establish his right to an award of compensation by proving the various conditions upon which his right to a recovery depends by a preponderance of the credible evidence. *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). *See also* Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1999 Supp. 44-501(a) states in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.
>
> The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).
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> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to the adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The evidence in this case is convincing that claimant did suffer accidental injury arising out of and in the course of his employment with respondent. Claimant describes work duties which involve substantial repetitive activities, including running jackhammers,

impact hammers, plumbing work, repair work, shovel work and handling pokers. While it is acknowledged respondent provided testimony from Mr. Compton and Mr. Surber that claimant's activities may not be repetitive for 8 hours per day, the evidence, nevertheless, supports claimant's contention that he, at the very least, aggravated his bilateral carpal tunnel condition while working for respondent. The only medical opinion on that point, that of Dr. Estivo, confirms that claimant's repetitive activities with respondent either caused or contributed to claimant's bilateral carpal tunnel condition. The Appeals Board, therefore, finds that claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent through a series of accidents ending September 1, 1999, resulting in bilateral carpal tunnel syndrome.

The Appeals Board acknowledges that respondent provided for consideration the deposition of Steve Benjamin. Mr. Benjamin provided a job description and videotape detailing the work activities of claimant. However, the videotape displayed a worker performing claimant's job duties for only two and a half hours of an 8-hour day. Additionally, the tape did not indicate if there was any dampness or moisture in the air which, according to Mr. Compton, would have affected claimant's job duties. The Appeals Board finds that the evidence from Mr. Benjamin was not sufficient to overcome the testimonies of claimant, Mr. Compton and Mr. Surber as to what claimant's job responsibilities and duties included during an 8-hour day.

K.S.A. 44-520 (Furse 1993) requires that notice of accident stating the time and place and particulars be provided to the employer within ten days of the date of accident. In this instance, it is acknowledged by the parties that claimant's date of accident constitutes a series through September 1, 1999. During claimant's meeting with Mr. Compton and Mr. Surber on September 2, 1999, claimant provided a work status report specifically detailing claimant's condition as involving bilateral carpal tunnel syndrome and dictating that claimant be taken off work at that time. And while both Mr. Compton and Mr. Surber testified that claimant did not specifically tell them his carpal tunnel condition was work related, Mr. Compton does acknowledge that claimant stated he was losing feeling in his hand and dropping tools.

The Appeals Board finds that claimant provided sufficient information to respondent on September 2, 1999, to satisfy the notice requirements of K.S.A. 44-520 (Furse 1993). The Administrative Law Judge's finding in this regard is affirmed.

The Appeals Board, therefore, finds that the Award of the Administrative Law Judge dated April 30, 2001, should be, and is hereby, modified as to claimant's date of accident of September 1, 1999, but in all other regards is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award is granted in favor of claimant for a 12 percent permanent partial disability to the body as a whole as a result of the bilateral carpal tunnel syndrome in Docket No. 248,383.

Claimant is entitled to 41 weeks temporary total disability compensation at the rate of $383 per week totaling $15,703, followed by 46.71 weeks permanent partial disability compensation at the rate of $383 per week totaling $17,889.93 for a 12 percent permanent partial disability to the body as a whole, making a total award of $33,592.93.

As of the date of this award, the entire amount would be due and owing in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of November, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director